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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR",
Petitioner,

against

McALLISTER BROTHERS INC., as owner of the Tug RUSSELL NO. 18, VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,
Respondents.

BRIEF FOR RESPONDENT McALLISTER BROTHERS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN
Attorney for Respondent
McAllister Brothers Inc.
80 Pine Street
New York, N. Y. 10005

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Petitioner,

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BRIEF FOR RESPONDENT McALLISTER BROTHERS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

The Court of Appeals did not exonerate respondent McAllister Brothers Inc. (McAllister) and the Tug Russell No. 18 from liability for negligence of its employees as petitioner states in its second reason for the granting of the Writ (p. 22 of petition). On the contrary, it held respondent McAllister and the Tug Russell No. 18 liable to the death claimants (subject to limitation of such liability pursuant to 46 USC 183). However, applying the doctrine of last clear chance, for reasons to be stated, it directed that McAllister's liability should be secondary to that of petitioner whose limitation of liability fund ex-

ceeds the total of the judgments (Opinion p. 42 of petition). At the conclusion of its opinion the Court of Appeals specifically directed that McAllister and the RUSSELL No. 18 could not be discharged from liability until the awards to the death claimants had been satisfied (Petition p. 47).

The Court of Appeals imposed liability in the first instance on petitioner because of faults which Judge Weinfeld in the District Court had characterized as "outstandingly egregious" in his discussion of petitioner's negligent acts (Cf. 248 F. Supp. (1965) at 22). The Court of Appeals divided the faults of respondent and petitioner "into two categories—acts causing the RUSSELL No. 18 to strike the mud bank and failure to take action that might have saved her or her crew once she did" (Petition p. 35), and included petitioner's "outstandingly egregious" acts of negligence in the second category, as the prime cause of the loss (Petition 35, 36).

In short, the faults for which liability in the first instance was imposed upon petitioner were the acts of its employees who, when they saw respondent's tug in danger and her crew members shouting their distress, deliberately cut the line holding respondent's tug to petitioner's ship, thus casting the tug adrift and helpless, without notifying petitioner's master on the ship's bridge of the distressed condition of the tug. If notice had been given to the bridge of petitioner's ship all the men on the tug could have been saved and the tug beached.

Those faults of petitioner clearly accounted for the loss and destroyed the last clear chance to save the men and the tug. Therefore, all other contentions asserted by petitioner involving this respondent are immaterial since they relate only to the faults which the Court of Appeals put in the first category, viz. acts which caused the RUSSELL No. 18 to strike the mud bank. Nevertheless we deal with them.

II.

Neither the Court of Appeals nor the District Court held or indicated that expert opinion must be accepted or was controlling or even preferable to testimony of fact witnesses, whether in conformity with or in contradiction of expert testimony.

The District Court discussed the testimony of the engineer of respondent's tug who, while in the lower engine room, heard the engine laboring, felt the vessel listing to port and heard and felt the unusual movement of an auxiliary part which could have occurred only if a force from outside the vessel acted against her rudder (cf. 248 F Supp. at 21). Later the rudder was found jammed hard over the starboard, indications of heavy pressure were found on the rudder quadrant, part of an auxiliary connected with the steering mechanism was found crushed, the rudder was found cracked and the rudder and propeller were found partially covered with mud and clay (cf. 248 F. Supp. at 21, 22). The conditions found as above described were pointed out to petitioner's experts but those experts were not called to the witness stand (cf. 248 F. Supp. 22 Note 6), nor did any other witness dispute the testimony regarding physical conditions subsequently found which testimony was supported by photographs in evidence and in some instances by written surveys signed by petitioner's representative.

Based upon the testimony of the tug's engineer as to what he felt, saw and heard while in the engine room, the testimony of respondent's expert witness as to what was found at a subsequent examination of the tug, and the testimony of the tug's deckhand as to the proximity of the tug to the edge of the channel, respondent's expert witness stated an opinion that the tug had been pressed against the channel bank shown on a chart in evidence and that her rudder had been jammed over to starboard which would

cause a severe list to port. On that evidence the District Court found that the tug had been pressed against the channel bank (248 F. Supp. at 21).

One of petitioner's strongly pressed contentions was that the District Court should not have found the tug was pressed against the channel bank because one of its witnesses testified that the buoys marking the channel edge were in deep water. That factual testimony, petitioner argued, should have overcome the evidence of the engineer and the uncontradicted testimony concerning later found conditions which clearly showed that the tug had struck the bank. The testimony on which petitioner places so much reliance was contradicted by a witness whose duty it was to learn all he could about conditions in the channel. Moreover, as the District Court found, the buoys were 900 feet apart. That one or more of the buoys may have been in deep water would not prevent a tug from being forced against the bank at a point between the buoys. In that state of the evidence it is clear that neither Court gave improper weight or effect to the evidence of expert witnesses.

III.

Contrary to petitioner's argument the Court of Appeals did not set aside the findings of the Trial Court. Indeed, those findings were expressly accepted on appeal (cf. Opinion Petition p. 38). The Court of Appeals modified the Trial Court's ruling on the law applicable to those findings. It was in connection with the question of the tug's general ability to be maintained on an even keel that the doctrine of last clear chance was applied, and petitioner does not contend that the Court of Appeals did not properly apply that well recognized principle of law. As the District Court opinion shows, respondent's tug, like thousands of other vessels with other than flat bottoms, was kept on an

even keel by distribution of weight on either side of the centerline, principally by the distribution of fuel and water ballast in the tanks designed for that purpose. Control of the level of fuel and water in the appropriate tanks from day to day and hour to hour must of necessity rest with the tug crew. The Trial Court found that on this day the distribution of fuel by the engineer on watch was such that the vessel was subject to a slight list under certain conditions. That was the basis of the Trial Court's holding that respondent and its vessel were liable subject to the right to limit liability. The Court of Appeals held that the fault of the tug's crew in respect of the vessel's trim at the time in question "would not constitute a *sine qua non* cause in view of the tug having been pressed against the bank, dragged through mud and her rudder jammed hard to starboard.

It was not pertinent for the Court to consider the matter fro mthe aspect of seaworthiness since recovery from the employer for the death of these seamen on inland waters may not be founded on unseaworthiness. *Gillespie* v. *United States Steel Co.*, 379 U. S. 148; 13 L. Ed. 2d 199, 85 S. Ct. 308.

IV.

Petitioner's ship master was being assisted by a pilot in McAllister's employ who, by the terms of the written contract between petitioner and respondent, became the servant of petitioner for whose acts petitioner assumed full responsibility. That contract provision, known as the Pilotage Clause, has been approved by this Court. *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311, *Bisso* v. *Inland Waterway Corp.*, 349 US 85, 99 L. Ed. 911 75 S. Ct. 629.

The Trial Court found and the Court of Appeals agreed that Skogen, the pilot who became petitioner's borrowed servant, committed certain faults. Because Skogen remained respondent's general employee, respondent was denied full

recovery from petitioner for the damage to respondent's tug. A recovery of one-half damages was allowed to respondent because of the clear and independent faults of other employees of petitioner.

However neither the Trial Court nor the Court of Appeals found Skogen was guilty of any of the faults which petitioner argues in its brief i.e. unfamiliarity with the channel and lack of knowledge of the tug's capabilities. Therefore petitioner's arguments in those respects are without foundation.

V.

The issues between petitioner and this respondent involve only the application of familiar principles of law to the facts of this case. Those principles were properly applied by the Court of Appeals. No important questions of law or policy are involved.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN
Attorney for Respondent
McAllister Brothers Inc.
80 Pine Street
New York, N. Y. 10005